

SEP 03 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON

U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,
Cross-Appellee

v.

DAVID VALENZUELA-VALENZUELA,

Defendant - Appellee.
Cross-Appellant

Nos. 02-10209,
02-10236
D.C. No. CR-01-00263-WHA

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William H. Alsup, Distict Judge, Presiding

Argued and Submitted May 13, 2003
San Francisco, California

Before: CANBY, KLEINFELD, and RAWLINSON, Circuit Judges.

Defendant David Valenzuela-Valenzuela was convicted and sentenced to 41 months in prison for illegally re-entering the United States without consent after a prior deportation, in violation of 8 U.S.C. § 1326. Valenzuela-Valenzuela appeals

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

the district court's denial of his motion to grant discovery on his claim of selective prosecution. The government cross-appeals the district court's refusal to award Valenzuela-Valenzuela a 16-level sentencing enhancement on the ground that the crime of sexual abuse of a minor does not categorically qualify as a "crime of violence" under the sentencing guidelines. *See* U.S.S.G. § 2L1.2(b)(1)(A). We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm with respect to Valenzuela-Valenzuela's appeal, and reverse and remand for resentencing on the government's cross-appeal.¹

We reject Valenzuela-Valenzuela's appeal of the denial of his selective prosecution motion because it is foreclosed by our recent decision in *United States v. Arenas-Ortiz*, ___ F.3d ___, 2003 WL 21911104 (9th Cir. Aug. 12, 2003).

Similarly, our recent decision in *United States v. Pereira-Salmeron*, 337 F.3d 1148 (9th Cir. Aug. 2003), holding that sexual abuse of a minor qualifies categorically as a "crime of violence," is determinative of the issue raised in the government's cross-appeal. Therefore, the district court erred in refusing to award a 16-level sentencing enhancement, and we remand for resentencing.

¹ We review for abuse of discretion the district court's decision to deny discovery on a selective prosecution claim. *See United States v. Candia-Veleta*, 104 F.3d 243, 246 (9th Cir. 1996). We review de novo the district court's interpretation of the sentencing guidelines. *See United States v. Ceron-Sanchez*, 222 F.3d 1169, 1172 (9th Cir. 2000).

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.